IN THE SUPREME COURT OF IOWA

NO. 15-1191

SPENCER JAMES LUDMAN,

Plaintiff – Appellee

v.

DAVENPORT ASSUMPTION HIGH SCHOOL,

Defendant – Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY,
THE HONORABLE NANCY S. TABOR

AMICUS CURIAE BRIEF of the IOWA ASSOCIATION FOR JUSTICE, SUPPORTING APPELLEE

Joel E. Fenton AT0011280

LAW OFFICES OF JOEL E. FENTON PLLC
541 31st Street, Suite C
Des Moines, IA 50312
Phone: (515) 480-1542
E-mail: joelfentonlaw@gmail.com

Elaine F. Gray AT0002411

FEHSEKE & GRAY LAW OFFICES
1023 Avenue G
Fort Madison, IA 52627
Phone: (319) 372-7181
E-mail: elaine@fehsekelaw.com

Eashaan Vajpeyi AT0011094

BALL, KIRK & HOLM, P.C.
3324 Kimball Avenue
Waterloo, Iowa 50704-2696
(319) 234-2638
E-mail: evajpeyi@ballkirkholm.com

ATTORNEYS FOR AMICUS CURIAE IOWA ASSOCIATION FOR JUSTICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

IDENTITY AND INTEREST OF AMICUS CURIAE

The objectives of the Iowa Association for Justice ("IAJ") include the promotion of the administration of justice for the public good, and the advancement of the cause for those who are damaged in person or property and who must seek redress therefore. Presently comprising more than 700 members, IAJ member attorneys collectively represent thousands of injured Iowans each year. The Association serves the legal profession and the public through its efforts to strengthen our justice systems, promote injury prevention, and foster the disclosure of information critical to the health and safety of all Iowa families.

Tens of thousands of Iowa youth engage in interscholastic athletics each year. These events are important and integral to the very academic, social, and civic fabric of the state. Iowa families are routinely transporting their children to practice and to games both home and away in activities that serve educational goals, promote physical fitness, encourage teamwork, and foster civic and regional pride. Because sports are a physical activity, participants will occasionally suffer physical injury. When that injury is preventable, or caused through the negligence of another person or entity, it often becomes the task of an IAJ member to consider whether there are grounds to seek civil liability for tort damages as compensation for the civil wrong. Because of the pervasiveness of sport and sporting facilities in our society, and the omnipresent danger of serious bodily injury to those

participating in a sport, the plaintiff's bar is necessarily interested in the outcome of any litigation that seeks to set limitations or otherwise circumscribe the fundamental issues of duty, negligence, causation, and recovery. In short, IAJ has a significant interest in the outcome of this case, and has a well-known track record of serving as an amicus to this Court in those cases where its expertise and interests are demonstrated.

ARGUMENT

I. Dudley and the "Foul Ball" rule

In its Appellate Brief, the Defendant argues that it is entitled to directed verdict on the duty element of Plaintiff Ludman's negligence claim based on application of the "limited duty rule." In its Amicus Curiae Brief, the Iowa High School Athletic Association picks up the same legal ball and carries it. It argues that the case is simply one of a baseball player being harmed by a foul ball. Both parties rely heavily on Dudley v. William Penn College, 219 N.W.2d 484 (Iowa 1974) in urging this Court to rule that high schools such as Davenport Assumption High School owe no duty to students who are also baseball players once those students don a uniform and step onto a baseball field.

First, the argument is an unfair interpretation of this Court's prior rulings. In Dudley, the Court did not find that William Penn College owed no duty, it found that Dudley failed to prove evidence sufficient to support a claim of negligence. Id. at 487. The Dudley contact sports exception is limited to negligence claims between Dudley, a baseball player, and the batter that hit him with a foul ball, another baseball player.

In this case, however, Davenport Assumption is not being sued in its capacity as the name on the batter's uniform but in its capacity as the property owner of the baseball field on which the batter played and Ludman was injured. Notwithstanding any contact sports exception or limited duty rule, the law remains that property owners must use due care in the maintenance of their property. *See* Koenig v. Koenig, 766 N.W.2d 635, 645 (Iowa 2009). Adherence to that duty requires a high school to ensure a high school playing field is safe – even when the playing field is one on which contact sports are played. *See eg*, Scott v.

State, 158 N.Y.S.2d 617 (Ct Cl.1956) and Frieze v. Rosenthal, 241 A.D. 719 N.Y.S. 1010 (1934). This duty is particularly important given the numbers of fans and student-athletes using such facilities, and the heavy use such facilities enjoy.

Second, the rule urged by the Defendant and the Iowa High School Athletic Association is bad policy. The Defendant and the Association argue that the rule should be that high schools should have no responsibility for injuries that occur to high school athletes unless the schools affirmatively do an act to increase the risk or create a new risk. Such a rule gives immunity to high schools that take no affirmative action to control risks thus effectively disincentivizing action. It rewards high schools that do nothing. In an age of escalating education budget cuts, compromising the safety of athletes is not a public policy direction this Court should encourage. Administrators and those who design, manage, and maintain these athletic facilities should always be encouraged to keep an eye toward maximizing safety.

This is particularly unfair to high school athletes. High school athletes are neither college athletes nor adults who participate in strictly recreational sports leagues. They are predominately minors involved in an educational system that encourages them to don uniforms with their school name emblazened on the front and go fight for their school with pride. They are students who choose to go beyond the legislative educational mandate that they simply attend school.

High school athletes give more of their time and their efforts to their high schools than they are required to give and their high schools benefit from it. The athletes' friends and families contribute to the school coffers with the gate fees they pay and concessions they purchase at sporting events.

When high school students don their uniforms, they *should* be able to rely

on a rule, as urged by the High School Association, but that rule should be the well established law of this state that a school "clearly owes a duty of reasonable care to a student." Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115 (Iowa 2001). Parents and students *should* be able to rely on the rule that schools are "liable for maintaining dangerous conditions." Anderson v. Webster City Cmty. Sch. Dist., 620 N.W.2d 263, 266 (Iowa 2000). Any argument that urges this Court to eliminate that duty once a high school student steps onto a ball field or any other sports field should be rejected.

II. The Restatement (Third) of Torts for Physical and Emotional Harm requires a finding of duty to use reasonable care in this case.

As adopted by the Iowa Supreme Court, starting most notably with Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009), the Restatement (Third) of Torts provides critical insight into whether Defendant's position regarding duty should be adopted or carried forward from cases prior to the Restatement and the cases subsequently adopting its provisions.

Sections 6 and 7 of the Restatement (Third) of Torts for Physical and Emotional Harm directly relate to the concepts of duty and were adopted by the Iowa Supreme Court in Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009). These sections instruct that in ordinary circumstances an actor owes a duty of reasonable care and is liable for its harms caused. Restatement (Third) §§6, 7(a). It is only in exceptional circumstances, "when an articulated countervailing principle or policy warrants denying or limiting liability" that the duty of reasonable care should be modified or abrogated. Restatement (Third) §7(b).

Additionally the Restatement describes certain relationships that give rise to a duty to use reasonable care. Restatement (Third) §40; Hoyt v. Gutterz Bowl & Lounge L.L.C., 829 N.W.2d 772, 775 (Iowa 2013). The Restatement (Third) §40 lists these special relationships. Included in the list are "a school with its students" and "a business or other possessor of land that holds its premises open to the public with those lawfully on the premises". Restatement (Third) §§40(b)(3), (b)(5). Restatement (Third) §40, cmt. *h* states that reasons for no-duty rules are obviated when one of the listed special relationships exists. One of the reasons enumerated by the Restatement (Third) for requiring a duty of reasonable care between those in certain special relationships is that "some relationships necessarily compromise a person's ability to self-protect, while leaving the actor in a superior position to protect that person." Restatement (Third) §40, cmt. *h*

In Hoyt, the Iowa Supreme Court decided if the Restatement (Third) and general policy considerations warranted exempting bar owners from the duty to exercise reasonable care. The Hoyt case involved a bar patron assaulted when he was in the bar's parking lot. Hoyt, 829 N.W.2d at 773. Relying on Restatement (Third) §§7 and 40 the court held that there were no principles or strong policy reasons to exempt bar owners from a duty of reasonable care. Id. at 777. The court further found that the justifications for requiring a business owner to exercise reasonable care, as stated in Restatement (Third) §40, were applicable to bar owners. Id.

Applying the considerations made by the Hoyt court to this case, the reasons for requiring reasonable care from actors such as the Defendant in this case are even stronger than those in Hoyt. Such as in Hoyt, there are no principles or strong policy considerations warranting the no-duty or extremely limited duty position advanced by the Defendant and the Iowa High School Athletic Association ("IHSAA"). The position advanced by the Defendant and the IHSAA would allow the owner of a baseball diamond with a completely unguarded dugout to be immune from liability if any two high schools decided to allow their students to play on that field. Whether or not two schools would allow this is unknown. However this kind of extremely unsafe scenario becomes a possibility when blanket immunities and no-duty or extremely limited duty determinations are upheld or enacted.

In weighing the burden on complying with a duty of reasonable care against the grave consequences of abrogating that duty to protect student athletes, the Hoyt case and the Restatement provisions governing special relationships instruct to uphold a duty to use reasonable care.

High school athletes should not be faced with the dilemma of deciding whether or not to participate in sporting events because the fields, the courts, or the stadiums where they are asked to play may be in an unsafe condition. If the court decided that there is no duty in a situation such as this case, a young athlete might be constantly faced with deciding whether an opposing team's playing surface was

safe enough. Or, another young athlete, dropped off at another field or diamond to play a game or have a practice, might not have the maturity or capacity to appreciate safety issues that are present. Arguably, most parents of high school athletes would be shocked to learn that those responsible for maintaining the premises where their children play have no duty to protect their children from risks such as those in this case. If students and parents cannot trust that the playing areas for high school athletics are in a safe condition the effect on high school sport participation would be far more disruptive than requiring land owners to properly maintain their premises. It is not unreasonable for this Court to expect those that maintain these facilities and those that administrate school programs and athletics to ensure the safety of their young charges.

Between young players and parents, school administrators and premises owners, the latter group is clearly in the superior position to ensure reasonable player safety. If a bar owner owes a duty to protect its patrons from assault in its parking lot, we owe it to student athletes to provide them with safe playing areas.

III. Juries play an important role in deciding the outcome of cases in this State and are entitled to render verdicts based on sufficient evidence presented at trial.

In its *amicus curiae* brief, the IHSAA wonders aloud what standards school districts should rely on in designing playing fields or determining whether a field is safe for its students. The answer was presented at trial of this matter when substantial evidence of widely available safety standards was presented to a jury of

eight Scott County residents, who found such evidence persuasive. Further, the IHSAA puts forth the argument that predicting what a jury would find to be reasonable care in constructing and maintaining a baseball diamond is too difficult and that what is reasonable should not be determined by "eight random people". The IHSAA's amicus brief reflects that "some [jurors] may have little or no experience with the sport at issue" when jurors in Iowa and everywhere else in the United States are called upon to evaluate forensic evidence, economic data, medical tests and records, and the testimony of countless experts from fields of endeavor greatly removed from their own "experience" and generally, the people do a pretty good job.

This type of argument ignores the reality of how a jury is picked and disrespects the important role that juries play in our system of justice. "Eight random people" may be called upon at any time in our state to judge a person guilty of a crime bearing a penalty of a life sentence, to find facts and assign liability in a case of professional malpractice, or sit in judgment on a complex commercial case involving issues of arcane complexity such as anti-trust. A right that extends back to the Magna Carta should not be taken so lightly.

The Restatement (Third) of Torts and the case law of Iowa, on innumerable occasions, emphasizes the important role that fact finders play in determining reasonableness and other critical elements of a case. The same body of authority acknowledges, through stringent standards regarding the grant of summary judgment, remitter, and new trial, that the fact finder is frequently in a superior

position to determine whether a party has or has not proven their case. *See e.g.* Sallis v. Lamansky, 420 N.W.2d 795 (Iowa 1988)(stating "Our case law shows that we have been loath to interfere with a jury verdict.")(citations omitted). A properly instructed and selected jury should indeed be competent to serve as finders of fact, and IAJ encourages the Court to recognize a jury's ability to understand facts and apply them.

Respectfully submitted,

Joel E. Fenton AT0011280

LAW OFFICES OF JOEL E. FENTON PLLC
541 31st Street, Suite C
Des Moines, IA 50312
Phone: (515) 480-1542
E-mail: joelfentonlaw@gmail.com

Elaine F. Gray AT0002411

FEHSEKE & GRAY LAW OFFICES
1023 Avenue G
Fort Madison, IA 52627
Phone: (319) 372-7181
E-mail: elaine@fehsekelaw.com

Eashaan Vajpeyi AT0011094

BALL, KIRK & HOLM, P.C.
3324 Kimball Avenue
Waterloo, Iowa 50704-2696
(319) 234-2638
E-mail: evajpeyi@ballkirkholm.com

ATTORNEYS FOR AMICUS CURIAE IOWA ASSOCIATION FOR JUSTICE

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation contained in Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 2875 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface, namely Times New Roman 14 point font in Microsoft Word.

/S/ - Joel E. Fenton AT0011280

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on February 3, 2016, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification to the parties of record.

/S/ - Joel E. Fenton AT0011280